FILE COPY

FILED
MAR 8 1929
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court
OF THE
United States

No. ~~682~~ 29
October Term, 1929

ALICE BARBEE WICK,
Appellant,

vs.

CHELAN ELECTRIC COMPANY and CHELAN COUNTY, a municipal corporation,
Respondents.

RESPONDENTS' STATEMENT OPPOSING JURISDICTION

F. G. DORETY,
St. Paul, Minnesota.
THOMAS BALMER,
EDWIN C. MATTHIAS,
CHARLES S. ALBERT,
Seattle, Washington.
FRANK T. POST,
Spokane, Washington.
Attorneys for Respondent, Chelan Electric Company.
J. A. ADAMS,
Wenatchee, Washington.
Attorney for Respondent, Chelan County.

MARTIN & DICKSON, PRINTERS

INDEX

	PAGE
Appellant's Contentions	1
Description of Land Sufficient	25
Federal Power License covers Lands Appropriated	23
Notice of Hearing Sufficient	3
Removability not an Issue	18
Tax Lien of Chelan County Prevented Removal	15
Use of Power by Washington Water Power Company is a Public Use	8

INDEX OF AUTHORITIES

PAGE

Arthur vs. Maryland Cas. Co., 216 Fed. 386 22
Baker vs. Jacksonville Traction Co., 247 Fed. 718 17
Ballard vs. Hunter, 204 U. S. 241, 255; 51 L. Ed., 461, 471 5
Beckwith vs. C. M. & St. P. Ry. Co., 223 Fed. 858 17
Bellaire vs. B. & O. R. R. Co., 146 U. S. 117; 36 L. Ed. 910 ..... 6, 23
Bellingham & B. C. R. Co. vs. New Whatcom, 172 U. S. 314, 320; 43 L. Ed. 460, 462 6
Boston vs. Jackson, 260 U. S. 309; 67 L. Ed. 274 6
Capperton vs. Bowyer, 14 Wall. 216; 20 L. Ed. 882 12
Carroll County vs. U. S., 18 Wall. 71, 82; 21 L. Ed. 771, 775 4
Clarke vs. Penna., 128 U. S. 395; 32 L. Ed. 487 12
C. & O. R. Co. vs. Cockrell, 232 U. S. 146; 58 L. Ed. 544 17
Chelan Electric Co. vs. Wick, 148 Wash. 479; 269 Pac. 827 3
Consolidated Turnpike Co. vs. N. & O. V. R. Co., 228 U. S. 326; 57 L. Ed. 857 7
Denning vs. Carlisle Packing Co., 226 U. S. 102; 57 L. Ed. 140 7
DeVoe vs. Rundle, 33 Wash. 604; 74 Pac. 836 17
Goins vs. S. P. Ry. Co., 198 Fed. 432 22
G. N. Ry. Co. vs. Alexander, 246 U. S. 276; 62 L. Ed. 713 15
Golden vs. N. P. Ry. Co., 104 Pac. 549; 220 U. S. 625; 55 L. Ed. 614 21
Graves vs. Colquitt Co., 129 S. E. (Ga.) 166 22
Green vs. Tidball, 26 Wash. 338; 67 Pac. 84 17
Gulf & S. I. R. Co. vs. Gulf Refining Co., 260 Fed. 262 17
Hanover National Bank vs. Moyses, 186 U. S. 181, 192; 46 L. Ed. 1113, 1120 6
Hansen vs. Boyd, 161 U. S. 397; 40 L. Ed. 746 12
House vs. Road Improvement Dist. No. 5, 266 U. S. 176, 177; 69 L. Ed. 229, 230 ..... 5, 7, 27
Hulbert vs. Chicago, 202 U. S. 275, 280; 50 L. Ed. 1026, 1028 7
In re Vadner, 259 Fed. 614 22
Knights of Pythias vs. Meyer, 265 U. S. 30, 33; 68 L. Ed. 885, 888 ..... 4, 14
Kohl vs. U. S., 91 U. S. 367, 377, 378; 23 L. Ed. 449, 553 23
Leonard vs. Vicksburg S. & P. R. Co., 198 U. S. 416; 49 L. Ed. 1108 7
2 Lewis on Eminent Domain (3rd Ed.) Par. 528, 535 17
Linne vs. Bredes, 43 Wash. 540; 86 Pac. 858 17
Loland vs. N. W. Stevedoring Co., 209 Fed. 626 22

PAGE

Maloney vs. Cressler, 210 Fed. 104 17
Matter of Matthew Addy S. S. Co. vs. Commerce Corp., 258 U. S. 417; 65 L. Ed. 1027 18
McCallister vs. C. & O. Ry., 243 U. S. 302, 310; 61 L. Ed. 735, 740 .. 17
McLaughlin Bros. vs. Hallowell, 228 U. S. 278, 286; 56 L. Ed. 835, 839 ..... 18, 19
Missouri Pac. Ry. Co. vs. Fitzgerald, 160 U. S. 556, 581; 40 L. Ed. 536, 542 ..... 18, 19
Missouri Pac. R. Co. vs. Clarendon Boat Co., 257 U. S. 533; 66 L. Ed. 354 7
Newman vs. Lynchburg Inv. Corp., 236 U. S. 692, 695; 59 L. Ed. 792, 795 6
North Coast Ry. vs. Hess, 56 Wash. 335; 105 Pac. 853 17
Northern Pac. Ry. Co. vs. Austin, 135 U. S. 315; 34 L. Ed. 218 21
Norton vs. Whiteside, 239 U. S. 144; 153; 60 L. Ed. 186, 190 6
Osborne vs. Clark, 204 U. S. 565; 51 L. Ed. 619 7
Pacific Livestock Co. vs. Lewis, 241 U. S. 440; 60 L. Ed. 1084 18
Powers vs. C. & O. R. R. Co., 169 U. S. 92; 42 L. Ed. 673 21
Puget Sound Power & Light Co. vs. King County, 264 U. S. 22; 68 L. Ed. 541 8
Remington's Compiled Statutes of Wash., Par. 922 3
Removal of Causes, Jas. Hamilton Lewis, Par. 305 19
Roberts vs. Underwood Co., 257 Fed. 583 17
Saltonstall vs. Saltonstall, 276 U. S. 260, 270; 72 L. Ed. 565, 568 4
State ex rel Woodruff vs. Superior Court, 145 Wash. 129, 137; 259 Pac. 379, 382 ..... 3, 4, 9, 17, 26, 27
State ex rel. Chelan Electric Co. vs. Superior Court, 142 Wash. 270; 253 Pac. 115 ..... 11, 27
State ex rel. Dominick vs. King County Superior Court, 52 Wash. 196; 100 Pac. 317 14
State ex rel. Trimble vs. Superior Court, 31 Wash. 445; 72 Pac. 89 .. 14
State vs. Easton & Amboy R. R. Co., 36 N. J. Law 181 17
United States vs. Sessions, 205 Fed. 502 22
U. S. Fidelity & Guaranty Co. vs. Okla., 250 U. S. 111; 63 L. Ed. 876 6
Wanner vs. Bissinger, 210 Fed. 96 22
Watson vs. N. Y. C. R. Co., 47 N. Y. 157, 162 17
Western Union Telegraph Co. vs. Oakley, 227 S. W. (Tex.) 211 22
Yankhaus vs. Feltenstein, 244 U. S. 127; 61 L. Ed. 1036 19

In the Supreme Court
OF THE
United States

No. 652

October Term, 1929

ALICE BARBEE WICK,

Appellant,

vs.

CHELAN ELECTRIC COMPANY and CHELAN COUNTY, a municipal corporation,

Respondents.

RESPONDENTS' STATEMENT OPPOSING JURISDICTION

APPELLANT'S CONTENTIONS

Appellant seeks the review by this court of a judgment of the Supreme Court of the State of Washington affirming a judgment of the Superior Court of Chelan County awarding her $13,500 as damages in an eminent domain proceeding for land overflowed by a water power project of the Chelan Electric Company. Jurisdiction of the court is invoked upon the stated grounds, (1) that the state

statute providing for notice to non-residents by newspaper publication once a week for two successive weeks does not constitute due process of law and that the notice actually given was insufficient; (2) that permitting the Electric Company to condemn lands for the purpose of developing power later to be sold to another public service corporation constituted the taking of property for private use and was not due process of law, and (3) that the state statute providing that taxes shall be a lien upon real estate vested an interest in Chelan County, a citizen of the State of Washington and thereby prevented removal of the cause to the Federal Court in violation of the constitutional provision conferring jurisdiction upon Federal Courts in controversies between citizens of different states. The only reference to other claims of jurisdiction is the following paragraph:

> "The validity of the proceeding was also challenged on the ground that it conflicted with the Fourteenth Amendment to the Federal Constitution because there was no adequate description of property sought to be condemned, that the land appropriated was in excess of the amount authorized by the Federal Power Commission and that the petition did not designate whether an easement or the title to the property was being condemned."

Appellant attempts no discussion of the grounds referred to in this paragraph nor cites authorities to support them.

The opinions of the Supreme Court of Washington affirming the order of public use and necessity and affirming the judgment awarding damages are reported in:

State ex rel Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 279 (R. 347, 347½);

Chelan Electric Company vs. Wick, 148 Wash. 179, 269 Pac. 827 (R. 534).

I.

The Contention in Regard to Notice of Hearing Given Appellant is Unsubstantial and Does Not Raise a Federal Question.

The Washington condemnation statute relating to notice provides that in cases of non-residents "service may be made by publication thereof in any newspaper published in the county where such lands are situated, once a week for two successive weeks . . . . and such publication shall be deemed service upon each of such non-resident person or persons whose residence is unknown." *Remington's Compiled Statutes of Washington,* Sec. 922.

The notice was published three times, once each week, on September 23, September 30 and October 7, 1926. (R. 19, 20.) Eighteen days intervened between the first and last publication. The notice was returnable October 11. (R. 21, 22.) The appellant appeared

in the proceeding three days before this time, or on October 8. (R. 15-17.) Hearing on the petition was actually had February 28, 1927—over four and one-half months afterwards. The appellant, through her counsel, was present at the hearing and contested the granting of the order of public use and necessity. (R. 62.)

The Supreme Court of the State of Washington determined that this statute did not regulate the return day in relation to the date of the publication and simply provided the minimum number of publications that must be made, once a week for two successive weeks; that this was not unreasonably short; and that the notice provided and gave reasonable time and opportunity to be heard. (R. 347½.)

State ex rel Woodruff vs. Superior Court, 145 Wash. 129, 137, 259 Pac. 279, 382.

The meaning attributed by the highest court of the state to the statute of the state must be accepted and such construction followed by the Supreme Court of the United States as though it had been specifically expressed in the statute.

Knights of Pythias vs. Meyer, 265 U. S. 30, 33, 68 L. Ed. 885, 888;

Saltonstall vs. Saltonstall, 276 U. S. 260, 270, 72 L. Ed. 565, 568;

Carroll County vs. U. S., 18 Wall. 71, 82, 21 L. Ed. 771, 775.

"Mixed with the contention is a charge that the notice to non-residents did not comply with the Act of 1893 or the general law of the state, but this is decided against plaintiffs in error by the Supreme Court of the State and we accept its ruling."

Ballard vs. Hunter, 204 U. S. 241, 255, 51 L. Ed. 461, 471.

A contention was made in this court that a statute authorizing seventeen days' notice by publication of an assessment for benefits in the establishment of a road district did not provide due process of law and violated the Fourteenth Amendment. The State Supreme Court held that the statute allowed 28 days' notice after the first publication during which time objection might have been made to the assessment. On the claim of insufficient notice and insufficient description this court said:

"Accepting the statute as construed by the state court, the suggested objections to its validity appear wholly wanting in merit."

House vs. Road Improvement Dist. No. 5, 266 U. S. 175, 177, 69 L. Ed. 229, 230.

This court has held in a case construing a Washington statute, that publication of notice in three successive issues of the official paper was sufficient and that it was impossible to hold that a ten days' notice was so short as to be absolutely void.

> "And especially is this true when the Supreme Court of the state in which the proceedings were had has ruled that it was sufficient. Before proceedings for the collection of taxes sanctioned by the Supreme Court of a state can be stricken down in this court it must clearly appear that some one of the fundamental guarantees of the rights contained in the Federal Constitution has been invaded."
>
> *Bellingham & B. C. R. Co. vs. New Whatcom,* 172 U. S. 314, 320, 43 L. Ed. 460, 462.

A provision of the Bankruptcy Act requiring ten days' notice is not unconstitutional because so unreasonable as to be incompatible with fundamental law.

> *Hanover National Bank vs. Moyses,* 186 U. S. 181, 192, 46 L. Ed. 1113, 1120.

A statutory requirement of 20 days' notice is satisfied by publication beginning 20 days before the time set:

> "When we speak of giving a week's notice or a month's notice we mean a notice that is a week or a month before the event."
>
> *Newman vs. Lynchburg Inv. Corp.,* 236 U. S. 692, 695, 59 L. Ed. 792, 795.

To give this court jurisdiction of a writ of error to a state court there must be a real and substantial controversy which deserves serious attention.

> *U. S. Fidelity & Guaranty Co. vs. Oklahoma,* 250 U. S. 111, 63 L. Ed. 876;
>
> *Boston vs. Jackson,* 260 U. S. 309, 67 L. Ed. 274;
>
> *Norton vs. Whiteside,* 239 U. S. 144, 153, 60 L. Ed. 186, 190.

A federal question may have been so explicitly foreclosed by prior decisions as to afford no basis for a writ of error.

Leonard vs. Vicksburg S. & P. R. Co., 198 U. S. 416, 49 L. Ed. 1108.

Questions similar to the one here presented with reference to the alleged invalidity of the state statute have been held to be too frivolous and unsubstantial in character to warrant this court taking jurisdiction.

House vs. Road Imp. Dist. No. 5, 266 U. S. 175, 177, 69 L. Ed. 229, 230;

Mo. P. R. Co. vs. Clarendon Boat Co., 257 U. S. 533, 66 L. Ed. 354;

Denning vs. Carlisle Packing Co., 226 U. S. 102, 57 L. Ed. 140.

The Supreme Court of Washington did not hold that the Washington statute with reference to notice in an eminent domain proceeding affords due process of law under the constitution of the United States. When the Federal constitution is not specifically referred to in the opinion of the Supreme Court of the state, it is presumed that the reference is to the state constitution.

Hulbert vs. Chicago, 202 U. S. 275, 280, 50 L. Ed. 1026, 1028;

Osborne vs. Clark, 204 U. S. 565, 51 L. Ed. 619;

Consolidated Turnpike Co. vs. N. & O. V. R. Co., 228 U. S. 326, 57 L. Ed. 857.

The decision of the highest court of a state as to the validity of a state statute under the state constitution is conclusive on this court.

Puget Sound Power & Light Co. vs. King County, 264 U. S. 22, 68 L. Ed. 541.

This court has held that 10 days' notice is sufficient to constitute due process of law. The appellant had 18 days' notice. She appeared in the action within 15 days and objected that she had received insufficient notice to make it possible for her to appear. Thereafter she had nearly five months within which to prepare for trial. Only in clear cases will this court set aside an act of legislation as wholly ineffectual on account of the shortness of time. The Washington statute has been in force for 38 years without question. These considerations demonstrate the frivolous and unsubstantial nature of the question raised.

II.

THE DETERMINATION BY THE STATE COURT THAT THE USE MADE BY THE WASHINGTON WATER POWER COMPANY OF THE POWER DEVELOPED BY THE CHELAN ELECTRIC COMPANY WAS A PUBLIC USE IS A CONCLUSION BASED UPON FINDINGS OF FACTS SUPPORTED BY EVIDENCE WHICH HAS NOT BEEN BROUGHT BY APPELLANT TO THIS COURT AND WHICH EVIDENCE IS THEREFORE NOT IN DISPUTE. NO FEDERAL QUESTION IS INVOLVED.

Appellant's intention is succinctly stated by the Supreme Court of the State of Washington:

"It is claimed that the use contemplated in this case is not a public use because the Chelan Electric Company has no transmission line nor any customer except the Washington Water Power Company which owns practically all of the stock of the Chelan Electric Company. That situation is explained in the *Getty* case. The Washington Water Power Company is a public service corporation of this state and is handling the enterprise in the name of the other corporation which was organized for similar public purposes. So far as this point is concerned there is no question about the public use to which the property will be put." (R. 347½.)

State ex rel Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 279.

In the *Getty* case, so-called, the Supreme Court summarized the relationship of the Washington Water Power Company to the Chelan Electric Company:

"Relator is a public service corporation which desires to expropriate the right to overflow certain lands of the respondents for the purpose of raising the surface of Lake Chelan, and thereby developing a large amount of electric energy. The primary purpose of the corporation appears to have been to furnish motive power for the operation of the trains of the Great Northern Railway Company, but, owing to the fact that the Railway Company has not yet started the development of its properties for that purpose, it was deemed better to allow the development of the power site to be handled by a company already actively engaged in that business, and which would have immediate demand and sale for the energy thus produced. To this end all of the

stock, save five qualifying shares, were sold to the Washington Water Power Company, which company agreed to develop the project and sell electricity to the railroad, when and as it became needed through the electrification of its railroad lines.

The Washington Water Power Company, which thus became practically the sole owner of the relator company, has been engaged in business in this state for many years supplying electrical energy to a very large extent in eastern Washington, and to a lesser extent in the neighboring state of Idaho. It has five water power sites on the Spokane River in this state and one in Idaho. It supplies electric energy to other public service corporations for the operation of railways and electric lines, furnishes power to municipalities and the inhabitants thereof for lighting streets and homes, as well as supplying power for general uses. Its present capacity of electric energy is insufficient for the demands made upon it, and, in 1925 and 1926, it was obliged to purchase power to avoid a shortage. To overcome the shortage and comply with new contracts, it is seeking to develop the Lake Chelan project. The power produced at this project will be delivered to it, and from it to its customers in the State of Washington."

After referring to one of its previous decisions, the court further said:

"This state has by statute since that time created the Public Service Commission with a duty upon it of regulating the service given and the rates charged by such companies as the relator and has submitted itself to that jurisdiction. The rights of the public to the use and enjoyment of electric power are, therefore, regulated, guaran-

teed and safeguarded by proper legislation, and public necessity requires that in fulfilling the duties it owes to the public generally, it be granted the right of eminent domain."

State ex rel Chelan Electric Co. vs. Superior Court of Chelan County, 142 Wash. 270, 253 Pac. 115.

The facts found are that the Chelan Electric Company is a public service company incorporated to manufacture the water power in question and to furnish power for any purpose to individuals, public or private corporations or municipal bodies. Its own rate schedules and those of the Washington Water Power Company have been filed with the State Department of Public Works of Washington, which h the right to regulate service and rates. The State of Washington and the Federal Power Commission had duly licensed the project subject to regulation by the state and federal bodies. The Washington Water Power Company, a public service corporation, owned all of the Chelan Electric Company stock except five qualifying shares for trustees. It was subject also to regulation by the State Department of Public Works. It had contracted to furnish public service corporations electric energy for railways and municipalities which depended upon it for such power. One contract required it to furnish power to the Great Northern Railway Company. The plants existing in 1925 and

1926 were insufficient to supply the needs of its customers and it became necessary to construct another plant, and for that purpose it bought the capital stock of the Chelan Electric Company and furnished the latter company with the money necessary to develop the Chelan power and deliver electric energy to the Washington Water Power Company. In order to develop the power and meet the requirements of the public and the customers of the Water Power Company it was necessary to construct a dam and overflow the lands of the appellant. It was found as a fact that the entire electric energy sold to the power company is and will be devoted to a public use, that the object for which the appellant's lands were appropriated was a public object and use, and was found as a conclusion of law also that the public interest required the prosecution of the enterprise, that the appellant's lands were necessary for that purpose, and that the use contemplated was a public use. (R. 62-80.)

The evidence upon which the findings of fact are based has not been made a part of the record and consequently the findings are not open to dispute in this court. It will be assumed there was evidence to support the findings.

Hansen vs. Boyd, 161 U. S. 397, 40 L. Ed. 746;
Clarke vs. Penna, 128 U. S. 395, 32 L. Ed. 487;
Capperton vs. Bowyer, 14 Wall. 216, 20 L. Ed. 882.

The rights of the public to the use of the hydro-electric power to be generated by the respondent, are regulated, guaranteed and safeguarded by proper legislation. The fact as found by the trial court is that the power company, for the purpose of supplying power for public use, purchased the stock of an existing company, the electric company, and is doing through the electric company what it must do, and that is, supply such power, regulated and controlled by the Department of Public Works of Washington. New power is delivered to the power company for the public use of its customers. The Federal Power Commission has granted a license to the Chelan Electric Company for fifty years to develop and use power and the State Supervisor of Hydraulics has authorized the appropriation of the water. Recapture of the property may, at the end of this period be had. It is, therefore, necessary that the separate corporate status of the Chelan Electric Company be preserved so that there may be a separate accounting. Excess earnings must be paid to the Government. The cost of this particular project must be allowed in the accounting. The state and federal licenses import the public purpose of the development. The Washington Supreme Court in two cases has approved this method of handling similar projects by separate companies:

"Does the fact that the respondent will sell and deliver a portion of its electrical power to third persons and corporations to be by them used for public and municipal rights and in the operation of railroads and railways, afford a sufficient reason for denying to it the right of eminent domain? We think not. Courts look to the substance rather than to the form, to the end rather than to the means. If in the end the property is to be devoted to a public use, the manner, agency or instrumentality through which that result is accomplished is a matter of no concern."

State ex rel. Dominick vs. King County Superior Court, 52 Wash. 196, 100 Pac. 317;

State ex rel. Trimble vs. Superior Court, 31 Wash. 445, 72 Pac. 89.

No state statutes are set out in the jurisdictional statement as being repugnunt to any specific provision of the Constitution of the United States. It is assumed that an attempt is made to question the validity of the eminent domain provisions of the Washington law. It is claimed that the trial court's finding the use to be a public use was "interpreting this statute of eminent domain as authorizing appellant's land to be taken for such a use."

This interpretation raises no federal question. The meaning given to the state statute is accepted by this court.

Knights of Pythias vs. Meyer, 265 U. S. 30, 33; 68 L. Ed. 885, 888, and cases cited under Point I.

III.

The Interpretation by the State Supreme Court of the Tax Statutes to the Effect That the Taxes Constituted a Lien Upon Real Estate Does Not Raise a Federal Question.

It is appellant's contention that the State Supreme Court interpreted Sections 11234, 11235, 11239, 11240, 11241, 11252, 11267 and 11272 of Remington's Compiled Statutes of Washington to mean that taxes were a lien upon the property of the appellant and that this interpretation prevented removal to the Federal Court.

The condemnation petition alleged that the names of each and every owner, encumbrancer, person or party interested in the property described, insofar as the same could be ascertained from the public records, were the appellant and Chelan County. This was required by the state statute. (R. C. S., Section 92.) The appellant and Chelan County were necessary and indispensable parties.

Removability is determined by the allegations of the condemnation petition and the cause cannot be converted into a removable cause by evidence or lack of it. This can only be accomplished by voluntary amendment or dismissal.

G. N. Ry. Co. vs. Alexander, 246 U. S. 276; 62 L. Ed. 713.

The statutory provisions attacked by the appellant were repealed long prior to the institution of this proceeding and were not before the State Supreme Court for consideration. In 1925 the Washington Legislature enacted a comprehensive tax code (Ch. 130, Laws of Washington, Extraordinary Session 1925), and repealed the previous statutes, including the particular sections referred to by appellant. Section 138 of the Code provides:

> "The acts and parts of acts relating to taxation, assessment, levy and collection of taxes, enumerated in the following schedule are hereby repealed . . . The following sections of Remington's Compiled Statutes of Washington: 11097 to 11171, both inclusive; 11188 to 11200, both inclusive; 11219 to 11225, both inclusive; 11234 to 11241, both inclusive; 11252 to 11311, both inclusive; and 11315 to 11317, both inclusive."

The question raised by appellant as to the effect of these provisions is therefore not before the court.

Section 104 of Chapter 130, Laws of Washington Extraordinary Session 1925, provides:

> "The taxes assessed upon real property shall be a lien thereon from and including the 1st day of March in the year in which they are levied until the same are paid, but as between the grantor and grantee such lien shall not attach until the first Monday in February of the succeeding year."

Interpreting the condemnation and tax statutes of the state, the Supreme Court of Washington has held that the holder of a tax lien is a necessary party defendant in an eminent domain proceeding.

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 379;

Green vs. Tidball, 26 Wash. 338, 67 Pac. 84;
North Coast Ry. vs. Hess, 56 Wash. 335; 105 Pac. 853;

Linne vs. Bredes, 43 Wash. 540, 86 Pac. 858;

DeVoe vs. Rundle, 33 Wash. 604, 74 Pac. 836;

2 Lewis on Eminent Domain (3rd Ed.), Sections 528, 535;

State vs. Easton & Amboy R. R. Co., 36 N. J. Law 181;

Watson vs. N. Y. C. R. Co, 47 N. Y. 157, 162.

The county being an indispensable party under the laws of the State of Washington, the case was not separable as between it and appellant Wick.

C. & O. R. Co. vs. Cockrell, 232 U. S. 146, 58 L. Ed. 544;

McCallister vs. C. & O. Ry., 243 U. S. 302, 310, 61 L. Ed. 735, 740;

Baker vs. Jacksonville Traction Co., 247 Fed. 718;

Maloney vs. Cressler, 210 Fed. 104;

Beckwith vs. C. M. & St. P. Ry. Co., 223 Fed. 858;

Gulf & S. I. R. Co. vs. Gulf Refining Co., 260 Fed. 262;

Roberts vs. Underwood Co., 257 Fed. 583.

The appellant Wick filed a petition and bond for removal in the lower court and secured an order removing the case to the District Court of the United States for the Eastern District of Washington, Northern Division. (R. 23-26.) There was no claim made of fraudulent joinder. The case then came on for hearing before the latter court upon a motion to remand, which was granted. (R. 46-47.)

An order of a Federal District Court remanding a cause to a state court is not subject to review by the Federal Supreme Court, either directly or indirectly, or by writ of error to the Supreme Court of a state. The action of the Federal District Court in remanding a cause is final and conclusive.

Matter of Matthew Addy Steamship Co. vs. Commerce Corporation, 256 U. S. 417, 65 L. Ed. 1027;

Pacific Live Stock Co. vs. Lewis, 241 U. S. 440; 60 L. Ed. 1084;

Missouri Pacific Ry. Co. vs. Fitzgerald, 160 U. S. 556, 581, 40 L. Ed. 536, 542;

McLaughlin Bros. vs. Hallowell, 228 U. S. 278, 286, 57 L. Ed. 835, 839.

The counsel for appellant admitted this in his brief on the appeal to the Supreme Court of the State of Washington from the judgment awarding damages after this case had been remanded by that court to the Superior Court for trial.

> "There is no U. S. statute allowing an appeal or review from the Federal Court's remanding of a cause, where the removal is attempted on the ground of diversity of citizenship,"

citing:

> "*Removal of Causes,* Jas. Hamilton Lewis, Sec. 305;
>
> *Yankhaus vs. Feltenstein,* 244 U. S. 127, 61 L. Ed. 1036;
>
> *McLaughlin Bros. vs. Hallowell,* 228 U. S. 278, 286,

and other U. S. Supreme Court cases."

A state court cannot be held to have decided against a right of removal when it has simply accepted the conclusion of the Federal Court remanding the cause.

> *Missouri Pacific Ry. Co. vs. Fitzgerald,* 160 U. S. 556, 581, 40 L. Ed. 536, 542.

A second petition for removal was presented during the course of the trial involving the question of damages. The evidence of this trial has not been made a part of the record. The order of the court denying the petition for removal is, however, contained in the record and clearly and fully states the facts as they came to the knowledge of the trial court. It appears from this order that the case was called for trial June 23, 1927, and appellant announced that she was ready for trial. The trial then proceeded without objection or special appearance on her part. Before the Chelan Electric Company rested, the evidence

showed that Chelan County was a necessary and indispensable party to the proceeding because of its interest in the vacation of an old road and the establishment of a new road over the property described in the condemnation petition. When the Chelan Electric Company rested, the appellant presented the second petition and the bond on removal but served no notice upon either the Chelan Electric Company or Chelan County. Both made objections to the granting of the petition. The case was reopened and evidence was introduced showing payment of the 1926 taxes by appellant on March 12, 1927, and that the assessed valuation of 1926 still stood as the assessed valuation for 1927. The court, after reciting these facts made the following order:

> "Now, therefore, it appearing to the court that this is not a separate controversy; that there has been no false or fraudulent joinder of parties hereto; that said petition, bond and affidavit on removal have been presented to said court without notice to either said petitioner, Chelan Electric Company or said respondent Chelan County, Washington, a municipal corporation; that the said Alice Barbee Wick has had full knowledge and notice of the fact that the said taxes for 1926 have been paid ever since the 12th day of March, 1927; that this cause proceeded to trial without objection on the part of the respondent Wick; that said Chelan County is a necessary and indispensable party to these proceedings, that this cause has heretofore been attempted to be removed by the said Alice Barbee Wick to the said United States District Court in and for the East-

ern District of Washington, Northern Division, and was on the 3d day of November, 1926, duly remanded by said United States Court to this court; that neither at the time of said removal nor at this time was the removal petition noticed, filed or heard within the time limited by law, and that there has been no change in the status of the parties hereto, requiring the granting of the petition for the removal herein.

"IT IS ORDERED, that said petition for removal be and the same is hereby denied. To which respondent Wick excepts, which exception is allowed." (R. 283-286.)

The question of the invalidity of the application of the taxation statute is therefore moot. The record shows that Chelan County was a necessary and indispensable party, not only because of its interest in its lien for taxes but because of its interest in the road to be vacated and the new road to be constructed across this tract.

The delay in presenting the second petition for removal for over two months and a half after payment of the 1926 taxes and proceeding to trial in the state court without objection waived the removal privilege.

Powers vs. C. & O. R. R. Co., 169 U. S. 92, 42 L. Ed. 673;

Golden vs. N. P. Ry Co., 104 Pac. 549, 220 U. S. 625, 55 L. Ed. 614;

N. P. Ry. Co. vs. Austin, 135 U. S. 315, 34 L. Ed. 218.

The provision requiring written notice of the presentation of the petition is mandatory and failure to give it prevents removal, or, after removal, requires the cause to be remanded. The state court had jurisdiction to pass upon the sufficiency of the removal papers and to deny the petition.

Western Union Telegraph Co. vs. Oakley, 227 S. W. (Texas) 211;

Graves vs. Colquitt Co., 129 S. E. (Ga.) 166;

Warner vs. Bissinger, 210 Fed. 96;

Arthur vs. Maryland Cas. Co., 216 Fed. 386;

Loland vs. N. W. Stevedoring Co., 209 Fed. 626;

Goins vs. S. P. Ry. Co., 198 Fed. 432;

In re Vadner, 259 Fed. 614;

U. S. vs. Sessions, 205 Fed. 502.

The controversy between Chelan County and the Chelan Electric Company is not separable from the controversy between the Chelan Electric Company and the appellant Wick. The county owned an easement in the land involved, and the appellant the fee. The parties were properly joined as defendants. The petitioner, the Chelan Electric Company, was a citizen and resident of the State of Washington and one of the respondents in the condemnation proceeding, Chelan County, was a citizen and resident of the same state. The subject matter of the controversy was whether the whole piece of land should be condemned.

"That controversy is not the less a single and entire one because the two defendants owned distinct interests in the lands and might be entitled to separate awards of damages."

Kohl vs. U. S., 91 U. S. 367, 377, 378, 23 L. Ed. 449, 553;

Bellaire vs. B. & O. R. R. Co., 146 U. S. 117, 36 L. Ed. 910.

The authorities cited under the first point in this brief are conclusive on the point that the interpretation given the state tax statute by the State Supreme Court did not raise a federal question. Moreover, removability did not depend upon this interpretation. It was prevented by the allegations of the condemnation petition, from which it appeared that the petitioner and one of the respondents were citizens of the same state. Furthermore, jurisdiction did not rest upon the taxing statute alone. The interest of the county in the roads made it a necessary and indispensable party.

IV.

The Flowage of Lands as Regulated by the Federal Power License Does Not Differ Materially From the Right Granted by the Decree.

One of the points designated by the appellant's counsel, but which has not been discussed by them, is the claim that the extent of the land appropriated

was in excess of that authorized by the Federal Power License. Assignment of error No. XIII is based on alleged error in making provision in the order of public use and necessity for the raising of the waters to the elevation of 1100 feet still water measurment above mean sea level, instead of to 1100 feet above sea level. The question is not properly before this court. It was not mentioned by the Supreme Court of the State of Washington in its decision. But if it were, it is too frivolous and unsubstantial to support as assignment of error here. The Federal Power License provided that:

> "The licensee shall at no time cause or permit the elevation of the surface of Chelan Lake to be raised above 1100 . . . Said elevations are in feet above mean sea level." (R. 421-440.)

The order of public use and necessity provided that the property to be taken was "the right in perpetuity to inundate and overflow to the maximum elevation of 1100 feet still water measurement above mean sea level" the land described. (R. 62-80.) The words, "still water measurement," define that which is a well known basis for measuring water and added nothing to the extent of the area to be overflowed. Article VIII of the Federal Power License provided:

> "For the purpose of determining . . . the amount of water held in and drawn from storage the licensee shall install and thereafter maintain

a standard gauge or gauges as may be necessary to determine the variation of the level of Chelan Lake and the rates and volume of discharge of water therefrom." (R. 421-440.)

The established method by which such gauge readings are made is from still water measurement, and must necessarily be so, or else there would be no standard to measure by. Manifestly there was no error in thus defining the limitation of the flowage rights. Even if the question were properly before the court it is unsubstantial.

V.

The Alleged Lack of Sufficiency in Description of the Lands Sought to Be Taken Does Not Raise a Federal Question.

The last contention made by the counsel for appellant in her brief is that the description of the land to be taken was inadequate and the petition did not disclose whether corporeal property or an easement was to be acquired. With reference to this the court below said:

"It is assigned that the property in each case is not described with reasonable certainty and that therefore the trial court obtained no jurisdiction. The descriptions are long and need not be set out in this opinion. An examination of them, however, satisfies us that they are sufficient to satisfy all question of jurisdiction as the same

affects the rights of resident owners upon whom personal service was had or the rights of any non-resident owner upon whom service was had by publication of notice. In substance the descriptions are like the one held to be sufficient in the *Getty* case. In this connection it is further claimed that the court erred in denying motions to make the petitions more definite and certain. It appears, however, that with such motions the relators filed motions for bills of particulars for the same purpose and that the order denying the first motions granted the second ones which have been complied with by the petitioner by the giving of minute detailed descriptions by metes and bounds in each and all of the cases of the lands to be flooded." (R. 347½.)

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 379.

What is involved is whether these descriptions complied with the Washington statutory and constitutional provisions. No federal question arises. The notice to the plaintiff in error specified that it was necessary to appropriate and acquire the perpetual right to impound the waters of Lake Chelan and the Chelan River and to raise the same to a maximum elevation of 1100 feet above mean sea level and to inundate and overflow to the maximum elevation of 1100 feet above mean sea level certain real estate, descriptions of which included government subdivisions and shorelands with a statement that the object of the proceeding was to determine the compensation in money to be paid for the taking or injuriously

affecting the lands, real estate and premises described and for a release from liability for all damages in any manner arising from the impounding and storing of the waters of Lake Cheland and the Chelan River. (R. 1-3.) The condemnor was required to include in that compensation all damages by wave wash, erosion, seepage, inundation or similar causes as the result of so holding the waters. (R. 62-80.) Upon a motion to make the descriptions more definite and certain, coupled with a motion to vacate and set aside service of notice, the Superior Court of Chelan County denied the latter motion, but expressly reserved to the plaintiff in error the right to re-present the motion prior to the hearing of the action as to the damage involved. (R. 56.)

Two months before the trial a description by metes, bounds, courses, angles, degrees and acreage was furnished appellants in a five-page typewritten bill of particulars. (R. 251-255.) The objection to the insufficiency of the description is wholly without merit. These descriptions were sufficient. No federal question is involved.

House vs. Road Imp. Dist. No. 5, 266 U. S. 175, 177, 69 L. Ed. 229, 330;

State ex rel. Chelan Electric Co. vs. Superior Court, 142 Wash. 270, 253 Pac. 115;

State ex rel. Woodruff vs. Superior Court, 145 Wash. 129, 259 Pac. 115.

We respectfully submit that the appellant's jurisdictional statement sets forth no substantial federal question for decision by this court.

F. G. DORETY,
THOMAS BALMER,
EDWIN C. MATTHIAS,
CHARLES S. ALBERT,
FRANK T. POST,
J. A. ADAMS,
Attorneys for Respondents.